

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11	ROBERT DAVID JOHNSON,	Case No. EDCV 12-1580 JFW (SS)
12	Petitioner,	ORDER ACCEPTING FINDINGS,
13	v.	CONCLUSIONS AND
14	CONNIE GIPSON, Warden,	RECOMMENDATIONS OF UNITED
15	Respondent.	STATES MAGISTRATE JUDGE

16
17 Pursuant to 28 U.S.C. § 636, the Court has reviewed the
18 Petition, all the records and files herein, the Report and
19 Recommendation of the United States Magistrate Judge, and
20 Petitioner's Objections. After having made a de novo
21 determination of the portions of the Report and Recommendation to
22 which Objections were directed, the Court concurs with and
23 accepts the findings and conclusions of the Magistrate Judge.
24 However, the Court will address below certain arguments raised in
25 Petitioner's Objections.

26
27 Petitioner argues that the Magistrate Judge erroneously
28 concluded that Petitioner's trial counsel made a strategic

1 decision not to call a gang expert because there is no factual
 2 support in the record regarding counsel's decision-making
 3 process. (Obj. at 3-10). This argument is misplaced. First,
 4 and most importantly, Petitioner's ineffective assistance claim
 5 was denied because Petitioner could not show prejudice, not
 6 because counsel's performance was deficient. See Smith v.
 7 Robbins, 528 U.S. 259, 286 n.14 (2000) (court may dispose of
 8 ineffective assistance of counsel claim on the ground of lack of
 9 prejudice without addressing deficiency prong of Strickland
 10 analysis). Second, Strickland's deficiency analysis even on
 11 direct review is an objective, not subjective, test. However,
 12 "[w]hen § 2254(d) applies, the question is not whether counsel's
 13 actions were reasonable. The question is whether there is any
 14 reasonable argument that counsel satisfied Strickland's
 15 deferential standard." Harrington v. Richter, __ U.S. __, 131 S.
 16 Ct. 770, 788 (2011). This argument fails.

17

18 Petitioner also contends that the Magistrate Judge
 19 erroneously found that the gang enhancement may apply even if the
 20 crime is not "gang-related" so long as the defendant acted with
 21 the specific intent to assist in criminal conduct by known gang
 22 members. (Obj. at 11-12). According to Petitioner, "without the
 23 People having to prove that a crime is 'gang-related,' any crime
 24 committed by gang members, or individuals in association with
 25 gang members, comes within the purview of section 186.22." (Id.
 26 at 11). Petitioner ignores that section 186.22(b)(1)'s elements
 27 are set forth in the disjunctive. As one California decision,
 28 cited in the Report and Recommendation, explained, "Commission of

1 a crime in concert with known gang members is substantial
2 evidence which supports the inference that the defendant acted
3 with the specific intent to promote, further or assist gang
4 members in the commission of the crime." People v. Villalobos,
5 145 Cal. App. 4th 310, 322 (2006). This argument fails.

6

7 Accordingly, **IT IS ORDERED** that the Petition is denied and
8 Judgment shall be entered dismissing this action with prejudice.

9

10 **IT IS FURTHER ORDERED** that the Clerk serve copies of this
11 Order and the Judgment herein on counsel for Petitioner and
12 counsel for Respondent.

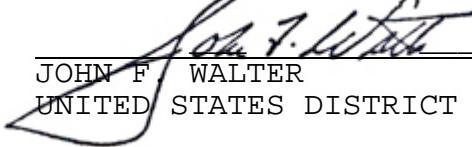
13

14 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

15

16 DATED: May 5, 2014

17


JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

18

19

20

21

22

23

24

25

26

27

28